UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FLOWERS GOLDENBERG,

Plaintiff,

v. 16 Civ. 6390 (AKH)

SG AMERICAS, INC., et al.,

Argument

Defendants.

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New York, N.Y.
January 30, 2017
11:20 a.m.

Before:

HON. ALVIN K. HELLERSTEIN

District Judge

APPEARANCES

EMERGENT, P.C.
Attorneys for Plaintiff
BY: PETER ROLDAN

MAYER BROWN LLP
Attorneys for Defendants
BY: NANCY G. ROSS

(Case called)

THE COURT: The case is Goldenberg v. SG Americas, Inc. We have Peter Roldan for the plaintiff.

MR. ROLDAN: Good morning, your Honor.

THE COURT: Good morning, Mr. Roldan.

And we have Nancy Ross on behalf of the defense. Good morning, Ms. Ross.

MS. ROSS: Good morning, your Honor.

THE COURT: It's a motion by Ms. Ross, so let's hear from her.

MS. ROSS: Thank you, your Honor. Thank you very much for your time this morning. Your Honor, this is an exceptionally unfortunate situation that brings us here this morning. I would like to express my sincere condolences to Mrs. Goldenberg and her son. Unfortunately, your Honor, this is not an actionable situation.

THE COURT: Is it something that happened this morning?

MS. ROSS: Her husband died.

THE COURT: I'm sorry to hear that.

MS. ROSS: That's why we are here.

THE COURT: It's the case?

MS. ROSS: Correct.

THE COURT: I'm sorry.

MS. ROSS: I'm sorry if I confused the Court.

THE COURT: I thought something else had happened aside from what I learned in the case.

MS. ROSS: No.

THE COURT: Please continue.

MS. ROSS: Not that I am aware of, your Honor. But it is an unfortunate set of circumstances, so I did want to express that. But it doesn't rise to the level of an actionable lawsuit against Societe Generale or the defendants named in the case.

This is a claim, your Honor, where Mrs. Goldenberg's husband was a lawyer in the law department of Societe Generale. He had previously been with a company by the name of Newedge. Newedge merged with Societe Generale and Mr. Goldenberg became an employee, a lawyer, of Societe Generale, beginning in January of 2015.

Prior to joining the company, Societe Generale notified the prospective employees of the benefits that they would be entitled to. In October of 2014, as is typically the case, that was the open enrollment period for all benefits that these new employees would be entitled to. During that open enrollment period Societe Generale passed out certain information about the benefits. I'll get back to that in a minute.

Thereafter, as I said, Mr. Goldenberg, started with the company of January 2015. Very sadly, Mr. Goldenberg had

been diagnosed with cancer in June of 2014, before the open enrollment period and before he became a Societe Generale employee. After he started with Societe Generale, in March of 2015 Mr. Goldenberg went on disability for treatment for his cancer. He subsequently passed away after that. So he was with Societe Generale for a very short time period.

The focus of this lawsuit is on the life insurance benefit to at which Mr. Goldenberg was entitled to and enrolled for.

The problem with the plaintiff's case, your Honor, is that it misses on all the required elements for it to be an actionable cause of action. It fails to show that Societe Generale had any fiduciary role or fiduciary obligations here. It fails to show that under the law of the Second Circuit there was any breach of any fiduciary duties here.

THE COURT: Even if there was a fiduciary responsibility, there was no breach?

MS. ROSS: Correct, your Honor. I'm going to go through each of those for the Court.

Thirdly, nothing that is pled in this complaint rises to the punitive level for the narrow surcharge remedy that the Supreme Court recently recognized, albeit some courts viewed it as dicta. But I'm sure this Court is well aware of the CIGNA v. Amara lawsuit in which the Court described the types of equitable relief that could be available in certain

circumstances, including surcharge. The Amara case was, by all accounts and all recognitions of all the courts, a case of intentional misrepresentation, frankly, of deceit.

Let me walk through the categories that I have pointed to here. First of all, with respect to whether Societe Generale constituted a fiduciary for purposes of breaching any fiduciary duties, the complaint is void of any allegations that point in any way, shape, or form to the discretion or control that is the sine qua non of fiduciary status.

Your Honor, if I point the Court to the complaint, there are only two places where the plaintiff pleads the fiduciary duty status of the defendants. The first is in paragraph 27, where the complaint reads, "On information and belief, Societe Generale is the plan sponsor, plan administrator, and named fiduciary of an employee benefit plan established for its employees."

The second reference with respect to defendants' having any fiduciary status is in paragraph 32 of the complaint. It is two sentences. Unless the Court would like, I'm not going to read the entire paragraph into the record

THE COURT: I have it in front of me.

MS. ROSS: Thank you. You will notice that it says, "Specifically, Societe Generale exercised discretionary authority and discretionary responsibility in communicating information about plan benefits to the participants, including

Martin." That is the sum and substance of any allegation in the complaint attempting to point to the defendants is a fiduciary.

Your Honor, we submitted to the Court, as the law allows us to do, the plan document. That is in the record at joint appendix 1. Reading that plan document, it is evident that Societe Generale has no role whatsoever in deciding whether benefits are permissible. The only role of Societe Generale throughout this entire document is that it is the policyholder.

THE COURT: What about communicating information?

MS. ROSS: Pardon me?

THE COURT: What about communicating information?

MS. ROSS: Yes, your Honor. The laws recognize that communicating with plan participants may be a fiduciary act. However, in all of the cases that the plaintiffs rely on, and as the defendants have shown the Court, the communicator was in a position more than simply being the employer. In the D'Iorio case the defendant was the plan administrator. There were two cases, one is motion to dismiss, one is summary judgment. That is the leading case that the plaintiffs rely on to say that communicating with plan participants may be a fiduciary act.

But certainly that proposition does not go so broad to say that any time an employer who has no other role with respect to a benefit plan opens its mouth or attempts to talk

to an employee about benefits, that that right qualifies that person as a fiduciary.

Your Honor, I'm going to switch to the issue of the breach that is alleged here.

THE COURT: Let's stay with D'Iorio. "Courts in this circuit have held that discussing future benefits with potential employees can give rise to fiduciary duties under ERISA." Plaintiff pleads under that case. Am I not required to accept that as if proved?

MS. ROSS: Not at all, your Honor. If the Court looks at the circumstances of that case, there is no dispute that the defendant that is being sued was not only the employer but was also the plan administrator.

THE COURT: But that is not the touchstone decision. That may have been one of the facts in the case. Here the court continues, "There is no dispute that the PowerPoint presentation given at the December 1, 2008, meeting was intended to provide information to the defendant's employees about its future benefits." That's just what happened here.

MS. ROSS: In that situation, your Honor, when the defendant in D'Iorio was presenting and explaining the information, they were also wearing the hat as the plan administrator of the plan. That is not the case here.

THE COURT: They are not sued as an administrator. They are sued as a fiduciary, and they are giving information.

I can't see a distinction at the pleading stage. I hold that Societe Generale was a fiduciary as required by D'Iorio v. Winebow, Inc., 68 F.Supp.3d 334 (E.D.N.Y. 2014). That is the Spatt decision. That's not a Second Circuit decision. That is a district court decision.

MS. ROSS: The case settled before it was tried.

THE COURT: I think Judge Spatt got it right, and I follow him.

MS. ROSS: I would like to draw the Court's attention to Judge Spatt's recognition that on 68 F.Supp.3d 334 the court notes, "The defendant is the plan administrator and named fiduciary of its LTD plan." That is not the situation here, your Honor.

THE COURT: Clearly, Societe Generale is not named is a fiduciary.

MS. ROSS: Correct.

THE COURT: It was a sponsor. Whether it was an administrator really doesn't make a difference. Judge Spatt was following Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 89 (2d Cir. 2001). "Where the Court of Appeals held that where an employer communicates with plan beneficiaries about the contents of the plan, an employer is acting in the fiduciary capacity for ERISA purposes, where reasonable employees could have thought that the employer was communicating with them both as employer and as plan

administrator."

I don't think it is required that they be both employer an administrator, as long as there is a position of responsibility that can make out a fiduciary. I so hold

MS. ROSS: Your Honor, with all due respect, under the plausibility standards of Twombly and Iqbal, I do believe that the plaintiff has more of a duty to show in the complaint, on the face of the complaint, that Societe Generale was exercising that discretion and control in discussing the benefits. This complaint is completely void of any mention of who was talking, what position the person was in.

In fact, the way the plaintiff has written this is somewhat in the passive voice. In paragraph 6 the plaintiff states that "On October 24, 2014, in preparation for the transition to Societe Generale, Martin received a copy of the open enrollment 2015 booklet prepared by Societe Generale." It doesn't say who prepared that, what position they were acting in, who was overseeing it.

With all due respect, I believe that this complaint is utterly void of any explanation is to how Societe Generale could have been acting in a fiduciary capacity.

THE COURT: I think it is adequately pled on paragraph 6. I hold Iqbal is satisfied.

MS. ROSS: I'm sorry, your Honor? I didn't hear.

THE COURT: I hold that Iqbal is satisfied. Paragraph

6 states the way that the information was presented to new employees in connection with the acquisition of the company by Societe Generale. Not sufficient. Let's go to breach.

MS. ROSS: All right, let's go to the breach. Your Honor, right below paragraph 6, in paragraph 7, the plaintiff admits that on the same day, and that is the same day as the presentation, Martin also received a copy of the benefits open enrollment booklet, which includes a summary of the employee life insurance benefit on paragraph 8. In paragraph 7 plaintiff admits -- at the end of the page there is a footnote in smaller type stating, "There is a reduction in the amount of insurance coverage after you reach age 64."

Your Honor, we submitted that benefits enrollment booklet which was given to Mr. Goldenberg at the same time as the presentation. That booklet is at JA-58, your Honor. The operative page, the relevant page of that booklet is at JA-65. I brought the Court's attention to it because the first paragraph talks about the amount of the basic life insurance. It then has an asterisk. That asterisk takes you where you would commonly look, to the bottom of the page, where it's set aside from the rest of the text. It says, asterisk "There is a reduction in the amount of insurance" --

THE COURT: Hold on. I'm looking at page 65 of 82, JA-62. Am I on the right page?

MS. ROSS: JA-65, your Honor.

THE COURT: Page 68 of 82. Okay.

MS. ROSS: Page 65.

THE COURT: I see it.

MS. ROSS: Therein lies the dispute in the case. Plaintiff admits that Mr. Goldenberg had this document at the same time he had the presentation. Unfortunately, Mr. Goldenberg just didn't read it as carefully as he should have. On the first page of that document, your Honor, at JA-59, the very opening says, "We encourage you to carefully read this guide to understand your options. You should pay close attention to what's different for the new year and be sure to select the best possible options for your needs and the needs of your family."

THE COURT: Could the plaintiff have purchased supplementary insurance?

MS. ROSS: That is not in evidence, your Honor, so I don't know the answer to that.

THE COURT: It is alleged that he could: that had he not been misled, he alleges he could have bought supplementary insurance. Have you looked into that?

MS. ROSS: We have not looked into that, your Honor.

THE COURT: The value here was that he may not have been able to buy insurance because he had an underlying cancerous condition, am I right? He knew he had cancer as of June of 2014?

MS. ROSS: Correct.

THE COURT: This takes place several months later.

MS. ROSS: Correct.

THE COURT: If at the time of October 2014 he is looking to buy life insurance, he may not be able to purchase it because of his underlying cancer.

MS. ROSS: That would certainly be something that we would explore on summary judgment, your Honor. Right now we are just dealing with --

THE COURT: I understand that.

MR. ROLDAN: Your Honor, if I may?

THE COURT: I'll get to you.

What I'm looking at is this. As an acquired employee, he presumably was eligible for the insurance that Societe Generale was giving him without having to undergo any medical examinations. He was entitled, whatever his medical condition, am I right?

MS. ROSS: Yes, I believe that's correct.

THE COURT: It was either this policy or nothing. This supports your argument that there was no breach, that as a lawyer he knew that this qualification occurred. He may not have known the full implication from this footnote, but you would argue he was on a duty to inquire.

MS. ROSS: Yes, that's correct, your Honor. The other thing, your Honor, is at the time of this he was over 70. If

he would have looked at the materials that had been passed out -- it is not asking much for a participant to read the materials they received.

THE COURT: What other materials were passed out?

MS. ROSS: At this time, your Honor, it was the PowerPoint presentation and this benefits open enrollment booklet. Those are the two documents that he received when he was enrolling. Subsequently, we believe that he would have received the summary plan description. That is not yet in the record.

The plaintiffs changed their position on that because while their complaint, which is of course the only thing the Court can go on, says that there is no evidence in its paragraph 17 with respect to the summary plan description, it says there is no evidence that Martin ever received a copy of this document before completing his benefit enrollment for his new position at Societe Generale. However, in their opposition brief to the summary judgment, they stated more emphatically that he never received the summary plan description. Your Honor, obviously you can't amend your complaint through your brief.

Your Honor, if I may.

THE COURT: I'm reading this allegation. "Plaintiff alleges that Ms. Koskinen sent the plaintiff a copy of the summary plan document which showed benefits modified by

age-based reduction." Then he added, "There is no evidence that the plaintiff ever received a copy of this document before completing his benefit enrollment." That is a rather cute way of pleading. Either he knew it or he didn't know it. He can't talk about the evidence here.

Thank you. Anything else you want to tell me?

MS. ROSS: Yes. I'm sure your Honor is aware of the circumstances that the Second Circuit and the courts have recognized where informal communication may rise to the level of constituting a breach. The courts in the Devlin case laid out certain circumstances as well as in the Bilello v. JPMorgan, requiring that the speaker know that the statement was false or not grounded in fact.

The times where the court has found a communication to be actionable are in four different circumstances. The first two involve the participant actually inquiring about their benefits and being misled.

THE COURT: What can you tell me about the circumstances of this dissemination of information on which plaintiff relies?

MS. ROSS: The plaintiff received the presentation as well as the open enrollment booklet that we just looked at before enrolling in his life insurance. He did not inquire. There is no evidence that he ever picked up the phone, asked about further life insurance. Your Honor, this was a gentleman

who unfortunately had cancer and who also was over the age of 70.

THE COURT: We have the display, the PowerPoint display, do we not?

MS. ROSS: Right. The PowerPoint display was targeted to be an overall description of all of the benefits. That PowerPoint display begins at JA-30. It covers all of the benefits. It certainly does not go into detail on the nuances of every single circumstance, nor are you required to as a fiduciary.

THE COURT: This is a summary.

MS. ROSS: This is a summary. This is the PowerPoint that was provided. It talks about medical, dental --

THE COURT: Point me to the page that carries the misleading statement.

MS. ROSS: Your Honor, there was no misleading statement.

THE COURT: Plaintiff's allegation.

MS. ROSS: The page that covers life insurance is on JA-49. It covers all of the primary points of coverage. It was not intended, nor would it ever have been reasonable, to cover all of the nuances. The participants, the employees, all received that open enrollment booklet at the very same time for the purpose of providing them with the other terms and conditions of the benefit programs.

Your Honor, this clearly does not rise to the level of being an affirmative misrepresentation. The essence of the plaintiff's claim is because Societe Generale does not state every single term and condition of life insurance in a general PowerPoint presentation that was targeted and geared towards all of the employees, that they breached their fiduciary duties. Your Honor, that is just not how the law works.

THE COURT: The way it works is that when an employee reaches 64, there is a downward adjustment in his insurance?

MS. ROSS: That's correct, your Honor.

THE COURT: If he dies before then, his benefit is twice his salary.

MS. ROSS: Correct.

THE COURT: Up to $750,000. If he dies after that, there is a downward adjustment because of age.

MS. ROSS: Correct.

THE COURT: Do you have anything else to tell me aside from breach? I got your argument that Societe Generale was not a fiduciary, your argument that there was no breach. Anything else you want to tell me?

MS. ROSS: Your Honor, I would just remind the Court that this certainly is not the circumstance where courts have recognized that a surcharge remedy --

THE COURT: I agree.

MS. ROSS: Thank you, your Honor.

THE COURT: Thank you.

Mr. Roldan.

MR. ROLDAN: Good morning, your Honor. I'll address the issue of misrepresentation and breach of fiduciary duty since you already held that the breach of fiduciary duty already existed.

THE COURT: I'm sorry. What did you say?

MR. ROLDAN: You have already held that there was a fiduciary duty.

THE COURT: Right.

MR. ROLDAN: On the part of Societe Generale.

THE COURT: Right.

MR. ROLDAN: So I am only going to address the issue of breach of fiduciary duty.

The focus of defendants' argument, your Honor, was on this booklet, the booklet provided, as well as the PowerPoint presentation. The booklet, we admit that it does state that there is a reduction in age benefits, but it doesn't go into any detail. The PowerPoint presentation notably doesn't make any mention of that reduction; it only states the amount of the benefit. If you look at JA-49, there is no mention of that.

And there is no mention at all of the enrollment summary that Martin received after he made his benefit selection. That is Exhibit B to the complaint. I'm afraid I don't actually know what the joint appendix page is. If you

look at that enrollment summary.

THE COURT: JA-74.

MR. ROLDAN: JA-74 states unequivocably that Martin had a benefit of $480,000. There is no mention of that reduction. This was the last thing that Martin saw before making his enrollment selections.

THE COURT: Take me through that.

MR. ROLDAN: If you look at the summary, it summarizes all of the different benefits that Martin will be receiving upon his enrollment --

THE COURT: Is that page JA-75?

MR. ROLDAN: That's right. One of the categories is life insurance. Next to that it will say that the amount of benefit is two times salary, $480,000. There is nothing on that page which suggests that there is any kind of reduction of that benefit. That is clearly a misrepresentation, your Honor. I don't see any other way you can categorize that. Societe Generale is saying under the terms of the plan he only had $240,000 in benefits. That clearly contradicts that.

When you combine that with the PowerPoint presentation, that doesn't make any --

THE COURT: Is the standard subjective or objective?

MR. ROLDAN: It is going to be subjective, your Honor.

THE COURT: If the applicant thought one way or another even though a reasonable person would have thought the

other way, that is sufficient to defeat a motion to dismiss?

MR. ROLDAN: I think so, your Honor.

THE COURT: It can't be.

MR. ROLDAN: The applicant was misled and had relied on that statement. I think he can reasonably rely on the representations made by Societe Generale in that enrollment summary. I don't see why he wouldn't be entitled to rely on that. This is information provided to him directly by the plan sponsor or the administrator.

One of the things we just don't know the details of is who prepared that enrollment summary.

THE COURT: What's the difference?

MR. ROLDAN: The difference is that we might need to name a new party if there was actually a third party who made that misrepresentation.

THE COURT: It is clearly the employer or someone acting for the employer, right?

MR. ROLDAN: Yes.

THE COURT: The employer is the sponsor, and you are claiming he is also the fiduciary.

MR. ROLDAN: Yes. As you pointed out, your Honor, the title of the --

THE COURT: What else do you need to know?

MR. ROLDAN: One of the issues brought up was whether Societe Generale knew that this was false information. We

don't know what the thought was behind preparing that enrollment summary.

We also would like to point out --

THE COURT: A summary, by definition, does not have everything in it.

MR. ROLDAN: No, your Honor. It is a summary. At the same time, it is misleading. It directly contradicts the terms of the plan.

THE COURT: It doesn't. It doesn't have a qualification. You are arguing that the absence of the qualification makes it misleading.

MR. ROLDAN: That's right.

THE COURT: Because any reasonable person hearing this would believe that it is an absolute statement, not a qualified statement.

MR. ROLDAN: Yes. If you look at the enrollment summary --

THE COURT: But that person has another booklet going along with it, and that person is a lawyer, and the lawyer is trained to look at things, not just take surface items. The lawyer would be on notice that it is not an absolute statement, it is a qualified statement. I would have to look and see what the qualification is, particularly if the lawyer already has cancer and it is doubtful that he can get other insurance.

MR. ROLDAN: Your Honor, even if Martin had tried to

make an inquiry, we have been told by Societe Generale in their motion that they had no duty to actually provide him with a summary plan document. He didn't actually receive any of this information until after he was already enrolled. If that is the case, even if he had tried -- we are not going to know now.

THE COURT: Someone who is going to enroll in a plan has to know what he is enrolling in. That is the purpose of this meeting, to inform the employees what they are getting.

MR. ROLDAN: He received material that said he would be getting $480,000 in a life insurance benefit.

THE COURT: Subject to qualification at the age of 64.

MR. ROLDAN: There are two communications, including the last one he received, which said it was going to be $480,000.

THE COURT: I think that has to be understood just as a general statement. At this point it's even more summary than the previous PowerPoint presentation. When do you allege he received the summary plan description?

MR. ROLDAN: He actually never received it, as far as I know. It was the son Aaron.

THE COURT: This pleading is too cute for me to believe that.

MR. ROLDAN: Unfortunately, Mr. Goldenberg isn't around to tell us whether he received it or not.

THE COURT: There is evidence that it was sent out on

June 1. June 1 of what date?

MR. ROLDAN: That was 2015. That was after he had passed away. It was actually to his son Aaron. He received that after the claim was denied, and he was trying to find out more about why the claim was denied. Really the only document that had the full terms of the plan wasn't provided to him. According to Societe Generale, it had no duty to provide it to him until after he had enrolled in the benefits plan, at which point it would have been too late to change any of his selections.

THE COURT: Is there any evidence from the company that they gave the summary plan document to the plaintiff before he enrolled?

MR. ROLDAN: I can't say that for certainty because Martin is no longer with us.

THE COURT: Is there any evidence that you know of?

MR. ROLDAN: No, there is none that I know of.

THE COURT: Ms. Ross?

MS. ROSS: Your Honor, the summary plan description along with all benefits materials is on a web portal that was available to the employees at any time.

THE COURT: But there is no evidence that that information was actually tendered to the applicant?

MS. ROSS: We have developed some information, your Honor, but we certainly didn't present it to the Court with a

motion to dismiss.

THE COURT: This is a 12(b)(6) motion?

MS. ROSS: That's correct, your Honor.

THE COURT: There have been no depositions in the case?

MS. ROSS: Right. Again, your Honor, our position is based upon what is pled on the face of the complaint. There is no allegation --

THE COURT: I can't take judicial notice about what was or was not on a web page.

MS. ROSS: Right.

THE COURT: The PowerPoint demonstration is alleged, and I can certainly take the complete PowerPoint demonstration. What was the other document that had the footnote? What is it called?

MS. ROSS: The plan document, your Honor, which is at JA-1. It is the second page. That was permissible. The Court could take that into consideration. It is at page JA-5. Your Honor, right at the top of the page --

THE COURT: The Voya financial plan?

MS. ROSS: Correct.

THE COURT: That had this information?

MS. ROSS: Correct.

THE COURT: I am going to take a five-minute recess.

(Recess)

THE COURT: I deny defendants' motion to dismiss. I hold that defendant wasn't acting as a fiduciary in its communication of information to people eventually eligible to be enrolled in the benefits plan. However, I am not able at this point to rule that there was a breach.

The two pieces of information, the PowerPoint presentation and the employee's insurance booklet that was given at the same time, should be read together. And there was a footnote in the booklet that announced to anyone interested that there would be a reduction in the amount of insurance coverage after the applicant reached age 64.

But there was no disclosure of what would be the effect of the adjustment, and the record does not know what information would be available to the applicant if the applicant inquired at that time. Without that conditional discovery, I cannot make a finding that there was or was not a breach. It is for that reason that I deny the motion at this time.

The motion under rule 12(b)(6) does not allow me to rule on the merits unless the merits are so clear that they rise to a standard that allows me to rule. Here, there is some murkiness sufficient to cause me to deny the motion.

As to the petition to surcharge, there is no level of deceit that rises to the level where a surcharge would be appropriate, and the allegations to recover for that are

stricken.

There is no need to amend the complaint at this point. You can go ahead with discovery. I can let you formulate a plan now or schedule a conference after you have had a chance to discuss what you want to do. Let me schedule a meeting; I think that would be better. How about March 3rd at 10 o'clock. Have a plan that you agree to and come in with that plan. If the defendant wants to make another motion based on the discovery, I'll entertain it.

March 3, 10 o'clock. Thank you.

(Adjourned)